Supreme Court, U.S.
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No. 96-51

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

GUY and BONNIE L. ADAMS (and others listed as parties), on their own behalf and on behalf of, and as Class Representatives of, all other persons similarly situated,

Petitioners,

v.

BURLINGTON NORTHERN RAILROAD COMPANY
and
BURLINGTON NORTHERN INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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I. INTRODUCTION

In accordance with Supreme Court Rule 15.6, Petitioners respectfully submit this reply brief to address new authority that has been published since Respondents' Brief was filed and certain assertions in Respondents' Brief in Opposition.[1]

On August 14, 1996, the Eighth Circuit Court of Appeals filed its decision in *Trostel v. American Life & Cas. Ins. Co.*, 92 F.3d 736 (8th Cir. 1996), *petitions for rehearing filed* August 27 and September 3, 1996. That case dealt with a lease assignment. The court held that Depression-era legislation directing that gold clause contracts would thereafter be "discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts" did not give a debtor an option to pay a novated lease in either dollars or gold. At the option of the creditor, the lease was payable in gold only. *Trostel* sheds light on the novation issues in this case and shows why there should be no distinction between leases and bonds when they are interpreted as contracts. In these important matters, *Trostel* conflicts with the Ninth Circuit decision in *Adams v. Burlington N. Ry. Co.*, 80 F.3d 1377 (9th Cir. 1996), *petition for cert. filed*, No. 96-51 (U.S. July 9, 1996), which artificially distinguished between leases and bonds and thereby held that the same Depression-era legislation allows payment of bonds in any tender that is legal at the time of payment, at the debtor's option.

Respondents' Brief glosses over the significance of *Trebilcock v. Wilson*, 79 U.S. 687 (1872), in an attempt

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[1] This Reply Brief does not respond to all disagreements Petitioners have with the reasoning in Respondents' Brief.

to trivialize its seminal importance to this case. This is discussed below.

Finally, Respondents inaccurately claim that transactions identified by Petitioners as creating a novation are "new" and outside the record. They are also incorrect in their argument that Petitioners have not established a basis for relief under Federal Rule of Civil Procedure 56(f).

II. *TROSTEL* SUPPORTS PETITIONERS' POSITION THAT REVIVED GOLD CLAUSE OBLIGATIONS ARE REQUIRED TO BE PAID IN GOLD; THEREFORE, IT CONFLICTS WITH *ADAMS*.

A. The Debtor in *Trostel* Was Required To Pay in Gold.

Trostel involved a gold clause in a 1917 commercial property lease assigned to the lessee-debtor in 1990 by the lessee-debtor's corporate parent. The lease contained a gold clause. The lessee maintained that a 1933 congressional resolution[2] declared gold clauses to be against policy and that gold clause obligations could be satisifed

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[2] J. Res. (1933), 48 Stat. 112, 113 (1933) (formerly codified at 31 U.S.C. §463; codified as amended at 31 U.S.C. §5118(d)-(2)). The resolution provided in part that any gold clause obligation "shall be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts." The *Adams* court held that this statute gave the debtor the option of paying its debts in any form of legal tender, including gold, and prevented any creditor from enforcing gold clauses in existing or future obligations – until the 1933 Resolution was amended by Pub. L. No. 95-147, 91 Stat. 1227, 1229 (1977) (formerly codified at 31 U.S.C. §463; recodified by Pub. L. No. 97-258 (1982); now codified at 31 U.S.C. §5118(d)(2) (1994)).

by payment "dollar for dollar" in United States currency. *Id.*, 1996 U.S. App. LEXIS 20300, at *4, 8-9.

The Eighth Circuit disagreed. The original legislation made gold clauses unenforceable only to the extent that they were required to be paid only in gold and not in United States currency. *Id.* at *15-16.

> The 1933 act did not magically erase the gold clause from the 1917 lease. Although it rendered the clause unenforceable, there is no reason that it could not be incorporated by reference in a new lease obligation entered into in 1990.

Id. at *17.

The Eighth Circuit also rejected the lessee's argument that the contract between the lessor and the new lessee did not contain a gold clause because the parties did not intend to include one in their 1990 agreement. Instead, the Eighth Circuit said that in construing a contract, the intent of the parties controls and that absent an ambiguity in the written contract, intent is determined by what the contract itself says. Since the contract was not ambiguous, the court found that the lessee-debtor, in agreeing to be bound by the terms of the 1917 lease, also agreed to be bound by the explicit and unambiguous gold clause in that lease. *Id.* at *19.

This is directly contrary to the holding in *Adams* which gave the debtor the option to pay the Gold Bonds in either gold or dollars. *Id.* at 1381. As such, the two decisions are in conflict on the same important matters within the meaning of Supreme Court Rule 10(a). This is a compelling reason why this Petition should be granted.

B. The Corporate Transactions in *Trostel* and *Adams* Created a Substituted Contract or Novation.

In *Trostel,* the lessee entered into a novation in 1990 when it accepted, assumed, and agreed to be bound by all the terms and conditions of the 1917 lease. This is little different from what Respondents did here. For example, in 1981 Respondents issued Supplemental Indentures and Burlington Northern Railroad Company became the "successor corporation" to the original issuer of the bonds. As such, Respondents assumed all payment and other obligations of the Gold Bonds. Burlington Northern Railroad Company (a distinct corporation) succeeded to and was substituted for Burlington Northern, Inc. (another distinct corporation). *See* Petitioners' Brief at 17. In assuming all the payment and other obligations of the Gold Bonds, Respondents ratified the gold clause obligations for the consideration exchanged in each corporate transaction.

The similarities between the corporate activities in *Trostel* and those in this case are striking. In each case, a substituted contract was created. In neither case should it have mattered that the substituted debtor may not have "intended" to assume a gold clause burden because it unambiguously agreed to be bound anew by the terms of the original contract that contained and created the obligation. *See Trostel,* 1996 U.S. App. LEXIS 20300, at *19-20. *Trostel* also properly analyzes the facts in a contract-interpretation environment without seeking to distinguish between leases and bonds, both of which are debt instruments. Indeed, the lease-bond distinction adopted by the *Adams* court is not supported by any persuasive authority.[3] The analytical differences

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[3] It is axiomatic that bonds are debt instruments: the bond issuer is the debtor, and the bondholder is the creditor. Every time

[footnote continued]

in *Trostel* and *Adams* also presents a compelling reason why this Petition should be granted.

III. *TREBILCOCK* CONTROLS.

Respondents do not read *Trebilcock* the same way that Petitioners do. Respondents see it as inapposite and applying only to the discharge of debts.[4] Respondents' Brief at 15.

Petitioners see it as controlling and a basic contract case in which the parties called for payment of a debt "in specie." Different kinds of dollars were then in circulation. "In specie" meant payment of dollars in gold. In *Trebilcock,* this Court held that when a contract expressly requires a specific medium or commodity of payment, it can be satisfied only by that actual medium or commodity of payment. There, the contract, a note, required payment in specie and this Court held that the payment and obligation was satisfied only by payment in specie, i.e., in gold. The obligation was not satisfied by payment of other kinds of dollars, which though legal, were not specified in the contract.

As support, the Court cited *Bronson v. Rodes,* 74 U.S. (7 Wall.) 229 (1869), which held that the parties' intent controls the method of payment. Thus, despite the existence of several types of legal tender dollars, an express contract payable in gold and silver coin was to be paid in such coin, not less-valuable existing and lawful currency notes. *Bronson* at 246, 249. The parties'

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a bond is transferred, a new creditor is substituted for the previous creditor. A lease is also a debt instrument. It is a conveyance of a property interest from a lessor to a lessee and a promise by the lessee to pay the lessor.

[4] Respondents ignore the fact that the Gold Bonds are debt instruments.

intent was to require payment in gold or silver coin, nothing else.

It is the dissent in *Bronson* that is adopted by Respondents and the *Adams* court. That dissent directly conflicts with the majority holdings in *Trebilcock* and *Bronson.* Dissenting Justice Miller stated that an act of Congress authorizing U.S. Treasury notes as another form of legal tender, passed after the contract was made, allowed a discharge of the contract in that form of money "without regard to the intent of the parties on that point." *Id.* at 257-58.

Thus, if as Respondents and the Ninth Circuit in *Adams* maintain, the Gold Bonds involved in this case were "issued" only once, when they first became securities, it logically follows that:

- The parties' intent at the time of "issue" was that these bonds be paid only in gold or its equivalent.
- Now that gold clauses are enforceable, and consistent with *Trebilcock* and *Bronson,* payment of the Gold Bonds must once again be in gold or its equivalent because that is what the parties intended.
- Respondents cannot have it both ways: either the Gold Bonds were "issued" when they first became securities, as the *Adams* court held, or they are "issued" each time they are sold or transferred to a new creditor and the debtor becomes obligated to pay that new creditor in accordance with the contract's terms, as Petitioners maintain. If the former, all bonds are payable in gold or its equivalent according to the parties' original intent; if the latter, at least those bonds purchased before 1933-34 and after 1977 are payable in gold or its equivalent, in accordance with the parties' intent and post-1977 legislation.

- If the Gold Bonds were "issued" only once, and all resulting rights and obligations (absent a novation or other contract substitution) were created at that time, it is simply irrelevant when the current holder purchased its bonds – whether before or after the 1933 and 1934 legislation.[5]
- Nor is the economic impact of Petitioners' demand relevant. Even if it is, there is no evidence in the record as to what that impact would be. Moreover, Respondents' directors, officers and shareholders are the ones who have enjoyed the financial windfall created by the 1933 abrogation of gold clause obligations.

In addition, because the contract issues are governed by Washington law, they are subject to the contract interpretation standards of *Berg v. Hudesman,* 115 Wn.2d 657, 801 P.2d 222 (1990), which allows factual inquiry and the use of extrinsic evidence regarding the parties' intent and the circumstances under which a contract or substituted contract, were formed.

IV. PETITIONERS' EXAMPLES OF TRANSACTIONS CREATING A NOVATION ARE NOT "NEW."

Respondents argue that some of the transactions presented by Petitioners which result in a novation are "new" and "not part of the record below." Respondents' Brief at 24. This is false. The Excerpts of Record presented to the Ninth Circuit in June 1994 refer to these transactions at page 85.

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[5]In fact, some of the Petitioners purchased their bonds before the 1933 legislation.

V. PETITIONERS WERE IMPROPERLY DEPRIVED OF RULE 56(f) RELIEF.

Two and one-half months after Petitioners filed their Complaint, and after refusing to respond to detailed pending discovery, Respondents moved for summary judgment in this case. The discovery that Respondents refused to answer related in significant part to their corporate transactions and to whether they had entered into substituted contracts or novations. For example, Petitioners asked for all documents relating to Respondents' corporate "spin-off," "merger," "consolidation," and "restructuring" activities; their relevant corporate records; records showing their effort "to defease or exchange any of the gold bonds"; their records of the *Rievman* settlement; and correspondence with the Gold Bond trustees – all of which Respondents refused to provide.

Federal Rule of Civil Procedure 56(f) requires only that the nonmoving party "for reasons stated" show why it cannot "present by affidavit facts essential to justify the party's opposition" to the summary judgment motion.

Petitioners' Rule 56 declaration must be read in conjunction with Petitioners' outstanding discovery. Indeed, it incorporated that discovery as follows:

> 2. *Plaintiffs' Discovery Requests.* On January 21, 1994, plaintiffs served defendants with Plaintiffs First Request For Production To Defendants. A copy of these initial discovery requests is attached as Exhibit 1.
>
> 3. *Defendants' Objections.* On February 23, 1994, defendants filed their "responses" and objections to plaintiffs' initial discovery requests. A

copy of these responses and objections is attached as Exhibit 2.

4. *Rule 56(f) Request.* At this early stage in the lawsuit, plaintiffs believe defendants' motion for summary judgment is inappropriate. In the course of discovery in this lawsuit, plaintiffs intend to seek production of information from defendants and third parties about defendants' complex corporate activities which plaintiffs believe results in novations of the Gold Bonds. Plaintiffs also intend to seek information about the benefits defendants have received from their continued reliance upon the 1933 Resolution and defendants' continuing attempts to avoid their obligations under the Gold Bonds. This information is critical to plaintiffs' claims for breach of contract, breach of implied duty of good faith and fair dealing, and unjust enrichment. Because this case is in its initial stages, and in part because of defendants' refusal to respond to plaintiffs' reasonable initial discovery requests, plaintiffs cannot now present by declarations facts essential to justify plaintiffs' opposition to defendants' summary judgment motion. Therefore, plaintiffs ask the court to refuse defendants' application for summary judgment or order a continuance so that plaintiffs' discovery may be pursued.

5. *Future Discovery.* Even with this litigation in its infancy, it is clear that plaintiffs will need to (among other things) propound substantial written discovery and conduct depositions of defendants, their representatives and various third parties, including the Gold Bond trustees, representatives of the entities defendants merged with, and the parties and lawyers who were involved in the *Rievman* litigation.

Excerpts of Record before the Ninth Circuit at 197-225.

To say, as Respondents state in their Brief at 25-26, that "[l]anguage so vague flunks the specificity test of Rule 56(f)" is not only inaccurate but demeans the fine reputation of the statement's author.

Petitioners' Rule 56(f) affidavit, taken as a whole, significantly identified the facts Petitioners sought to establish and demonstrated how those facts would raise an issue of material fact so as to defeat summary judgment.

VI. CONCLUSION

Broadly speaking, and without waiving any arguments in their Petition, Petitioners believe that the decision of the Ninth Circuit should be reversed if this Court reaches any one of the following conclusions:

(1) The Gold Bonds are now required to be paid in gold, in accordance with the original intent of the contracting parties; or

(2) *Trebilcock* (and now *Trostel*) do not give a Gold Bond debtor the option to discharge its post-1977 substituted contract debt by the tender of dollars instead of gold; or

(3) This material issue of fact must be resolved at trial: Did Respondents enter into a substituted contract after October 1977? or

(4) Petitioners are entitled to Rule 56(f) relief.

This is a significant case dealing with great issues of public and financial importance. It involves the interpretation of contracts and the rights of contracting parties. The issues are not isolated, as the current number of active Court of Appeals cases involving Gold Bonds attests. Moreover, this case involves conflicting decisions between the Eighth and Ninth Circuits. As such, the

Petition for Writ of Certiorari should be granted, and ultimately this matter should be remanded back to the trial court for appropriate trial proceedings.

Dated September 20, 1996.

Respectfully submitted,

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